Supreme Court, U.S.
FILED
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No. 07-1324

In The

Supreme Court of the United States

VLADIMIR DURKIN,

Petitioner,

v.

MICHAEL B. MUKASEY,
ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

VLADIMIR DURKIN
3517 Maunalei Avenue
Honolulu, Hawaii 96816
(808) 739-1786

QUESTIONS PRESENTED

1) Whether The 9th Circuit Panel misapprehended the law and overlooked the facts when it found that the Board of Immigration Appeals (BIA) even though NOT engaging in a de novo review of the facts as found by the Immigration Judge, simply arrived at a different conclusion based on the same facts and ordered the Immigration Judge to reverse her ruling of granting the withholding of deportation/removal of the Petitioner (Vladimir Durkin) and to proceed with an order of removal instead.

2) Whether The 9th Circuit Panel had an obligation to overturn the decision of the Board of Immigration Appeals, when such decision was derived by omitting the law and it's guidelines and by acting beyond the limits of BIA's authority.

3) Whether the BIA abused its discretionary power when it reversed the Immigration Judge's (IJ's) ruling without proving that IJ's finding of facts were clearly erroneous; 8 C.F.R. § 1003.1(d)(3)(i).

PARTIES TO THE PROCEEDING

Petitioner

VLADIMIR DURKIN
3517 Maunalei Avenue
Honolulu, Hawaii 96816

Respondent

MICHAEL B. MUKASEY
Attorney General of The United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

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CITATIONS FOR OPINIONS BELOW

Decision of the Three Judge Panel of the United States Court of Appeals for the Ninth Circuit denied petition for a review (App. 1), Oral Decision of the Immigration Judge ordering removal (App. 4), Decision of the Board of Immigration Appeals (App. 7), Decision of the Board of Immigration Appeals reversing IJ's grant of withholding of removal (App. 8), Decision and Order of the Immigration Judge ordered that respondent's application for withholding of removal is granted (App. 12), Decision of the Three Judge Panel of the United States Court of Appeals for the Ninth Circuit denying the petition for panel rehearing and the petition for rehearing en banc (App. 26), were not reported.

BASIS FOR JURISDICTION IN THIS COURT

The Court of Appeals and its Three Judge Panel filed its decision on Dec. 26, 2007. That Court denied the Petitioner's petition for rehearing and petition for rehearing en banc and filed its order on Feb. 27, 2008. 28 U.S.C. § 1254(1) confers jurisdiction on this Court to review on writ of certiorari the opinion of the Court of Appeals and its Three Judge Panel.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

8 C.F.R. § 1208.16 provides, in relevant part, as follows:

> a) Consideration of application for withholding of removal. An asylum officer shall not decide whether the exclusion, deportation, or removal of an alien to a country where the alien's life or freedom would be threatened must be withheld, except in the case of an alien who is otherwise eligible for asylum but is precluded from being granted such status due solely to section 207(a)(5) of the Act. In exclusion, deportation, or removal proceedings, an immigration judge may adjudicate both an asylum claim and a request for withholding of removal whether or not asylum is granted.
>
> (b) Eligibility for withholding of removal under section 241(b)(3) of the Act; burden of proof. The burden of proof is on the applicant for withholding of removal under section 241(b)(3) of the Act to establish that his or her life or freedom would be threatened in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.

STATEMENT OF THE CASE

On April 22, 2004, the Petitioner was convicted for the offense of Unlawful User of Controlled Substance in Possession of a Firearm in violation of 18 U.S.C. § 922(g)(3). Petitioner was sentenced to 364 days imprisonment. The Department of Homeland Security charged Petitioner as removable, pursuant to § 237(a)(2)(c) and § 237(a)(2)(A)(iii) of the Act.

Petitioner sought withholding of deportation pursuant to Immigration and Nationality Act (the "Act"), Section 241(b)(3) and under Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "Convention Against Torture"). Petitioner conceded that he has committed a deportable offense and that he is not statutorily eligible for asylum.

On November 9, 2004, the Immigration Judge (IJ) ordered that the Petitioner's application for withholding of removal to Section 241, is granted. The IJ further ordered that Petitioner is removable to Croatia at a time when withholding is no longer necessary. The IJ denied Petitioner's application under the Convention Against Torture.

DHS appealed the IJ's ruling. DHS argued that Petitioner failed to establish "a clear probability" that Petitioner would suffer persecution if he is removed to Croatia. In an Order dated April 4, 2005, the Board of Immigration appeals sustained DHS' appeal, reversed IJ's November 9, 2004 grant of withholding

of removal and remanded the record to the IJ to enter the final order of removal.

On April 19, 2005, the IJ without comment, ordered Petitioner removed. Petitioner appealed this April 19, 2005 order with the Board on the basis that errors were made. On November 7, 2005, the Board affirmed, **without opinion**, the Immigration Judge's April 19, 2005 order.

Petitioner sought review of the Board's decision dated November 7, 2005. On December 26, 2007, without oral argument, the Three Judge Panel of the Court of Appeals denied Petitioner's Petition and agreed with the Board of Immigration Appeals that "the evidence presented by Durkin fails to establish that it is more likely than not that he will be persecuted on account of a statutorily protected ground if returned to Croatia."

ARGUMENT

The Three Judge Panel of Court of Appeals (9th Circuit) misapprehended the law and overlooked facts when it found that the Board did not engage in a de novo review of the facts, but instead the Board examined the facts as found by the IJ, but it arrived at a different conclusion based on those facts.

The Panel went on to deny Petitioner's Petition, agreeing with the Board of Immigration Appeals that "the evidence presented by Durkin fails to establish

that it is more likely than not that he will be persecuted on account of a statutorily protected ground if returned to Croatia."

Immigration Judge found facts, with a lot of effort and scrutiny put into investigation of the case, and has understood the situation of the Petitioner (and likelihood of him being persecuted) and has ruled accordingly by granting the Petitioner the withholding of the removal.

Being of mixed nationalities, with no known/living relatives (except his sister Vesna Durkin-Tang, who lives in Hawaii, U.S.A.) and nobody that he knows in Croatia, not knowing the language and customs, being on the margin as an ethnic minority that is subjected to daily harassment in Croatia, not having gone there for most of his life ever since he settled in the U.S. as a little boy and having no records and known citizenship, the Petitioner's physical and emotional well being will be greatly endangered if removed to Croatia. Numerous unsolved cases of disappearance, homicides and harassments of the worst kind are a real threat to the Petitioner if removed. More so, the Petitioner never served in the Croatian military, nor did he help in the war in Balkans which puts him in the category of the "unexcepted individuals" and is a direct threat to his physical integrity and freedom from the government agencies in Croatia, which have broad authorities when dealing cases such as Mr. Durkin's.

Those are the findings of the facts of the IJ, that represented the foundation to her ruling dated November 9, 2004.

8 C.F.R. § 1003.1(d)(3)(i) Scope of review, provides, "The Board will not engage in de novo review of findings of fact determined by the Immigration Judge. Facts determined by the Immigration Judge, including findings as to the credibility of testimony, shall be reviewed only to determine whether the findings of the Immigration Judge were clearly erroneous."

After reviewing the record, the BIA held that the IJ erred in granting Petitioner's Application for withholding of removal. However, simply coming to a different conclusion from the IJ does NOT permit the Board to reverse the prior decision by the IJ. The Board does NOT state anywhere in its decision that the IJ's findings were "clearly erroneous." Without this finding, the Board overstepped its permitted scope of review pursuant to 8 C.F.R. § 1003.1(d)(3)(i).

CONCLUSION

The Decision of the Ninth Circuit Panel has opened the door to more wide-spread dismissals of cases which are based on facts, as determined by IJs, by BIA and substantial abuse of its discretionary powers.

Based on truthful and overwhelming facts and credible testimonies of witnesses as well as the fact that the Petitioner does not have a home country to return to (wrongfully assumed as Croatia) and has spent almost his whole life here in the U.S., the Petitioner respectfully asks this Court to grant this petition for writ of certiorari to the Petitioner.

DATED: April 21, 2008

Respectfully submitted,

VLADIMIR DURKIN
Petitioner

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VLADIMIR DURKIN, Petitioner, v. MICHAEL B. MUKASEY,** Attorney General, Respondent.	No. 05-76662 Agency No. A90-240-441 MEMORANDUM* (Filed Dec. 26, 2007)

On Petition for Review of an Order of the Board of Immigration Appeals

Argued and Submitted November 5, 2007
Honolulu, Hawaii

Before: O'SCANNLAIN, TASHIMA, and M. SMITH, Circuit Judges.

Vladimir Durkin, a native of the former Yugoslavia and a citizen of Croatia, petitions for review of an order of the Board of Immigration Appeals ("Board" or "BIA"), affirming an Immigration Judge's ("IJ) order of removal. The IJ had granted Durkin's application

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** Michael B. Mukasey is substituted for his predecessor, Alberto R. Gonzales, as Attorney General of the United States, pursuant to Fed. R. App. P. 43(c)(2).

for withholding of removal, but, on appeal by the government, the BIA reversed and remanded for the IJ to enter a final order of removal. After the IJ ordered Durkin removed, the BIA affirmed without opinion. We have jurisdiction pursuant to 8 U.S.C. § 1252, and we deny the petition.

We disagree with Durkin's contention that the BIA violated 8 C.F.R. § 1003.1(d)(3) by failing to defer to the IJ's factual findings.[1] Rather than engaging in a de novo review of the facts, the Board examined the facts as found by the IJ, but it arrived at a different conclusion based on those facts.

The evidence presented by Durkin fails to establish that it is more likely than not that he will be persecuted on account of a statutorily protected ground if returned to Croatia. *See Fedunyak v. Gonzales,* 477 F.3d 1126, 1130 (9th Cir. 2007) (stating that, to establish eligibility for withholding of removal, an applicant must establish "a clear probability of persecution," which requires proving that "it is 'more likely than not' that he will be persecuted on account of a statutorily protected ground") (quoting *Korablina v. INS,* 158 F.3d 1038, 1046 (9th Cir. 1998)). The BIA's decision that Durkin failed to establish eligibility for withholding of removal accordingly must be upheld. *See Ornelas-Chavez v. Gonzales,* 458 F.3d 1052, 1055-56 (9th Cir. 2006) (stating

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[1] Because the parties are familiar with the factual and procedural background, we do not repeat it here, except as necessary to aid in understanding this disposition.

that the BIA's determination regarding withholding of removal must be upheld if supported by substantial evidence).

We reject Durkin's contention that the BIA erred by applying a more stringent standard for withholding of removal than 8 C.F.R. § 1208.16 provides. *See Canales-Vargas v. Gonzales,* 441 F.3d 739, 746 (9th Cir. 2006) (interpreting the "clear probability" standard to mean "more likely than not," which "is more stringent than asylum's 'well-founded fear' standard because withholding of deportation is a mandatory form of relief").

Finally, the Board did not act *ultra vires* in ordering the IJ to enter a final order of removal. The Board's order remanding for the IJ to enter the order of removal was in keeping with this court's precedent at the time. *See Molina-Camacho v. Ashcroft,* 393 F.3d 937 (9th Cir. 2004), *overruled by Lolong v. Gonzales,* 484 F.3d 1173 (9th Cir. 2007) (en banc)). Under *Lolong,* when the BIA reverses an IJ's grant of relief, this merely reinstates the order of removal that has already been entered by the IJ. *Lolong,* 484 F.3d at 1177. *Lolong* did not, however, limit the Board's power to remand to the IJ to enter the order of removal. The Board accordingly did not act *ultra vires* in doing so.

PETITION FOR REVIEW DENIED.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Honolulu, Hawaii

File No.: 90 240 441 April 19, 2005

In the Matter of	)	
VLADMIR DURKIN	)	IN REMOVAL REMAND PROCEEDINGS
Respondent	)	

CHARGE:

APPLICATIONS:

ON BEHALF OF RESPONDENT:	ON BEHALF OF DHS:

ORAL DECISION OF
THE IMMIGRATION JUDGE

This remand, dated April 4, 2005, relates to this Court's decision on November 9, 2004 to grant withholding of removal from Croatia for this respondent. The Department of Homeland Security appealed. The Department's appeal was sustained in the Board's order dated April 4, 2005. In the last paragraph of that decision, the Board stated that "the record is remanded to the Immigration Judge to enter a final order of removal. *See* Molina-Camacho v. Ashcroft, 393 F.3d 937 (9th Cir. 2004).

The case was scheduled for hearing on April 19, 2005. The respondent filed a motion to continue the

Master Calendar on that day stating that respondent has filed a *motion to reconsider* with the Board on April 18, 2005. This judge asked the court administrator to check the case database maintenance system to see if the appeal was received. The court administrator reported to this judge that the *motion to reconsider* had not been received by the Board.

The Department argued that the court was under a mandate to follow the remand decision and issue an order of removal to Croatia. The respondent argued that the respondent was entitled to further consideration including a continuance to allow his reasons for the case to be reconsider [sic], to be ruled upon by the Board of Immigration Appeals.

Clear instructions as to remands relating to *Molina-Camacho v. Ashcroft* are not clear. However, it is clear that the instruction of the Board of Immigration Appeals to this Immigration Judge is to enter a final order of removal. Therefore, the motion to continue will be denied and the following order shall be entered:

ORDER

IT IS HEREBY ORDERED that the respondent be removed from the United States to Croatia on the charges contained in the Notice to Appear.

DAYNA BEAMER
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE DAYNA BEAMER in the matter of:

VLADIMIR DURKIN

A 90 240 441

Honolulu, Hawaii

is an accurate, verbatim transcript of the cassette tape as provided by the Executive Office for Immigration Review and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

/s/ Ruby L. Bowen/ST
Ruby L. Bowen, Transcriber

Free State Reporting, Inc.
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Annapolis, Maryland 21401
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September 2, 2005
(completion date)

By submission of this CERTIFICATE PAGE, the Contractor certifies that a Sony BEC/T-147, 4-channel transcriber or equivalent, as described in Section C, paragraph C.3.3.2 of the contract, was used to transcribe the Record of Proceeding shown in the above paragraph.

U.S. Department of Justice
Executive Office for
Immigration Review

Falls Church, Virginia 22041

Decision of the Board of
Immigration Appeals

File: A90 240 441 – Honolulu Date: May 31, 2005

In re: VLADIMIR DURKIN

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Pro se[1]

ON BEHALF OF DHS: Heith M. Kaneshige,
Assistant Chief Counsel

ORDER:

PER CURIAM. The respondent moves the Board pursuant to 8 C.F.R. § 1003.2 to reconsider our decision dated April 4, 2005. We find no basis to disturb our previous decision finding that the respondent failed to establish that it is more likely than not that he will suffer persecution if he returns to Croatia. 8 C.F.R. § 1208.16(b)(1)(B)(iii). Accordingly, the motion is denied.

/s/ Anthony C. Moscato
FOR THE BOARD

[1] The record indicates that the respondent is being assisted by counsel, however, no Notice of Appearance (Form EOIR-27) has been submitted. As a courtesy, a copy of this decision will be mailed to Gary G. Singh, Esquire, 220 South King Street, Suite 2150, Honolulu, Hawaii, 96813.

U.S. Department of Justice
Executive Office for
Immigration Review

Falls Church, Virginia 22041

Decision of the Board of
Immigration Appeals

File: A90 240 411 – Honolulu Date: Apr. 4, 2005

In re: VLADIMIR DURKIN

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Gary G. Singh, Esquire

ON BEHALF OF DHS: Heith M. Kaneshige
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] – Convicted of aggravated felony

Sec. 237(a)(2)(C), I&N Act [8 U.S.C. § 1227(a)(2)(C)] – Convicted of firearms or destructive device violation

APPLICATION: Withholding of removal; Convention Against Torture

ORDER:

PER CURIAM. The Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) has appealed from the Immigration Judge's decision dated November 9, 2004. The Immigration Judge found the respondent removable

as charged in the Notice to Appear (Form I-862) and granted the respondent's application for withholding of removal under section 241(b)(3) of the Immigration and Nationality Act. On appeal, the DHS argues that the Immigration Judge erred in finding that the respondent established a clear probability that he will suffer persecution if he is removed to Croatia. The DHS's appeal will be sustained.

Based upon our review of the record, we find that the Immigration Judge erred in granting the respondent's application for withholding of removal. Since the respondent's fear of future persecution is unrelated to the past persecution he suffered in the orphanage,[2] the respondent bears the burden of establishing that it is more likely than not that he will suffer persecution if he returns to Croatia. *See* 8 C.F.R. § 1208.16(b)(1)(B)(iii). In this matter, the respondent claims that he fears future persecution in Croatia, due to his inability to speak Croatian fluently, his failure to return to Croatia and aid Croatians in their struggle against the Serbians, and his perception as an American. While the testimony of respondent's witnesses and the documentary evidence in the record indicate that there is general discontent among people in Croatia, due to ethnic tensions and a slow economy, the evidence in the record does not establish a clear probability that the respondent will

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[2] The DHS has not contested the Immigration Judge's finding of past persecution on appeal.

suffer persecution in Croatia (Tr. at 36-37). Specifically, the testimony of the respondent's witnesses indicates that during their recent visits to Croatia, they were repeatedly asked for their identification by government officials and were the subject of some random instances of discrimination and violence (Tr. at 39, 50-51, 64). However, these incidents do not rise to the level of persecution. The 2003 Country Report for Croatia prepared by the United States Department of State is consistent with the testimony of the respondent's witnesses regarding ethnic tensions, but suggests that the security situation in Croatia remains relatively stable. *See* Exh. 7. Hence, we find that the respondent has failed to present sufficient evidence to establish that it is more likely than not that he will suffer persecution if he is removed to Croatia. Similarly, we find that the respondent has failed to establish a clear probability of torture by or at the acquiescence of the Croatian Government, as required for protection under the Convention Against Torture. *See INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

Accordingly, the DHS's appeal is sustained, the Immigration Judge's November 9, 2004, grant of withholding of removal is reversed, and the record is remanded to the Immigration Judge to enter a final order of removal. *See Molina-Camacho v. Ashcroft*, 393 F.3d 937 (9th Cir. 2004).

/s/ Patricia [Illegible]
FOR THE BOARD

Board Member Juan P. Osuna respectfully dissents without opinion.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Honolulu, Hawaii

File A 90 240 441 November 9, 2004

In the Matter of

VLADIMIR DURKIN,	)	IN REMOVAL
	)	PROCEEDINGS
Respondent	)	

CHARGES: Section 237(a)(2)(C) Immigration and Nationality Act – Alien convicted of firearm offense; Section 237(a)(2)(A)(iii) Immigration and Nationality Act – Alien convicted of aggravated felony under Section 101(a)(43)(E) referencing Title 18 U.S.C. Section 922

APPLICATIONS: Section 241(b)(3) Immigration and Nationality Act – Withholding of removal; United Nations Convention Against Torture

ON BEHALF OF RESPONDENT:	ON BEHALF OF DHS:
Gary G. Singh, Esquire	Heith Kanesbige, Esquire Assistant Chief Counsel

DECISION AND ORDER OF THE IMMIGRATION JUDGE

The respondent is a 33-year-old, native of the former Yugoslavia and apparently is now a citizen of Croatia. The Department alleges that he was admitted to the United States as a visitor for pleasure, at New York, on or about June 13, 1981. His status was adjusted to lawful permanent resident on March 29, 1989. The Department further alleged that he became removable upon being convicted in the United States District Court, District of Hawaii, on April 22, 2004, for the offense of *unlawful user of controlled substances* and *possession of a firearm*.

Proceedings were commenced with the filing of a Notice to Appear with the Immigration Court at Honolulu on August 6, 2004. See Exhibit 1. The respondent admitted the allegations and conceded the firearms offense. He declined to designate a country and filed the Form Z-589. Meanwhile, respondent, with the assistance of counsel, did research on the aggravated felony charge and that was eventually conceded. Respondent applied for withholding of removal and withholding or deferral under the Torture Convention. He agreed that he is not statutorily eligible for asylum. A briefing schedule was entered and all the parties filed additional material.

The individual hearing was conducted over several days but primarily on October 26, 2004, November 5, 2004, and concluding on November 9, 2004.

Exhibit 1 through and including Exhibit 16 were received and there were no objections.

Based upon the respondent's admissions, but more importantly the judgment in criminal case #1-03CR00143-001, this Court finds that the respondent is removable on both charges contained in the Notice to Appear. Respondent was actually convicted under Title 18 United States Code Section 923(g)(3) for the offense of *unlawful user of controlled substances* and *possession of a firearm*. See Exhibit 2.

During the course of the proceedings, the respondent, his sister, his brother-in-law, and his defense attorney all testified. There was nothing in any of their demeanor which detracted from their overall credibility. All the witnesses appeared to be credible, candid, and sincere in their testimony.

STATEMENT OF THE LAW

An alien is entitled to withholding of removal if he demonstrates by a "clear probability" that he would be persecuted were he to be removed to the home country. The applicant must show that it is "more likely than not" that he will be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion. A rebuttable presumption of entitlement to withholding of removal arises when an applicant shows that he has suffered past persecution, such that his life or freedom was threatened in the home country on account of a protected ground. The Attorney General has no

discretion to deny withholding of removal to eligible aliens. *See Ladha v. INS*, 215 F.3d 889 (9th Cir. 2000), and cases cited therein. Although past persecution generates a presumption of eligibility for withholding of removal, unlike asylum, past persecution is not a separate for withholding eligibility. An applicant can only show eligibility by demonstrating a likelihood of future persecution.

For asylum application filed on or after April 1, 1997, an applicant shall also be considered for eligibility for withholding of removal under the United Nations Convention Against Torture. The applicant for withholding of removal under the Torture Convention bears the burden of proving that it is "more likely than not" that he would be tortured if removed to the proposed country. 8 C.F.R. Section 208.16(d)(2). Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity. *See Zheng v. Ashcroft*, 332 F.3d 1186 (9th Cir. 2003). Torture, within the meaning of the Convention, is an extreme form of cruel and inhuman treatment.

DISCUSSION OF THE EVIDENCE

The Department argues that the respondent is not eligible for withholding of removal because he has been convicted of a particularly serious crime. See exhibit 6. In making a determination as to whether

respondent has been convicted of a particularly serious crime, the Court has carefully considered the conviction record, including the indictment, the memorandum of plea agreement, and the judgment. Respondent's arguments about the circumstances of the case were also corroborated by the Federal public defender, Alexander Silvert, who represented the respondent in the criminal case. The Court has also considered, among other cases, the Attorney General decision in *In re Y-L-*, *In re A-G-*, *In re R-S-R-*, 23 I&N Dec. 270 (A.G. 2002). Having reviewed the Attorney General decision in that case and applied the criteria therein, along with reviewing the record, this Court finds that respondent has not been convicted of a particularly serious crime. Therefore, since he did not get a sentence of five years incarceration but was only sentenced to 364 days, the Court finds that he is eligible to apply for withholding of removal.

Next, we look at the evidence to see whether respondent has established that he was persecuted in the past. Respondent's testimony was consistent with his written application, including detailed declarations describing his life as an orphan from the age of four in the former Yugoslavia. The Court finds that respondent was born in what is now Croatia on November 13, 1970. He entered the United States on June 13, 1981 and never left the United States again. From the time he was three or four years old when his mother died, he lived in an orphanage. The Court finds respondent credible in his explanation of how he was mistreated as an orphan. This is also summarized in

respondent's opening brief, in the background material discussion. Respondent's testimony was corroborated by that of his older sister, Vesna Durkin-Tang. This is the sister that raised him from the age of 10 when she was able to get him out of the orphanage and to New York City where she had emigrated at the age of 22. In short, respondent was separated from his other minor brother who was put in a different orphanage. He was unable to see his older sister who remained in Yugoslavia and was later murdered. He was not adequately fed. He was beaten and mistreated.

The next question becomes whether respondent can show a likelihood of future persecution. Respondent, his sister, his brother-in-law, and another witness who testified who is not a blood relative but is a friend, Hrovje Tomic, all testified that they believe there is a well-founded fear of persecution if respondent returns to Croatia now.

Turning to Mr. Tomic's testimony, he said that he was born in Croatia and emigrated after becoming a visitor and then marrying a United States citizen. He naturalized in 2001. He testified that he returned to Croatia to help his countrymen fight the Serbs and others during the recent civil unrest. He also testified that he is from the same city, Zagreb, that the respondent's family comes from. He testified that when he returned for a visit in 2003, that he observed relations between people to be very poor. He said that there were many newcomers who were displaced refugees from other parts of Yugoslavia. He testified

they get not [/s/ DB] government help, are hostile, and see other people as at fault for their bad destinies. Respondent's witness, Mr. Tomic, testified that he was even attacked on a city street simply because he was speaking Croatian with a somewhat distinguishable English accent. He testified that there are some Muslims and some Serbs in Croatia now who are not very friendly towards Croatians. He also testified that he was insulted as being called an "American boy." Mr. Tomic's opinion was that the respondent would suffer a worse fate because he no longer speaks Croatian and would be easily targeted as an outsider with no ties to any circle of people.

He testified that his own parents remain in Croatia but they have to move in a very small circle. He also testified that there are former soldiers who have post-traumatic stress disorder because they participated in or viewed atrocities and have lost contact with reality. He also stated that police often stop people to check their identities and this appeared to be a form of harassment in Mr. Tomic's view. Finally, he summarized his opinion that respondent would return to physical and emotional trouble, particularly because he did not serve in the military when there was a worldwide call for help from Croatians who were fighting the Serbs. Mr. Tomic stated that he lived all his life in Croatia and was educated there and has trouble getting around, especially at night, and also did serve in the military twice, including when the worldwide call was made.

This is the basis for his opinion that respondent would likely suffer persecution if returned to Croatia.

Vesna Durkin-Tang also testified tearfully about the questions that she has encountered on her visits back to Croatia to tend to family graves and also to allow her American-born children to see the place where she is from. She testified that she was even questioned about whether her ancestors could remain in a particular cemetery which hinged on whether they were living in the area prior to 1941. She testified that she speaks the dialects of each region in Croatia and this allows her to travel without raising too much suspicion. Her husband opined that their [re /s/ DB] did appear to be suspicion when he traveled with her since they were stopped on virtually every occasion that a police officer was present in the area.

Vesna testified that people in her region don't like Americans. She testified that her brother wouldn't survive more than three days without being shot in the head if he is returned to Croatia. She testified that she has observed that police there do nothing about harassment and fights and that one must mingle in order to avoid conflicts. She said that her brother no lon[illegible]er speaks Croatian because she concentrated on teaching him English when he arrived at New York at the age of 10. She said when she raised him in the United States, she did not expose him to what is over there and she corroborated his testimony that he was essentially locked up in the

orphanage and even up to age 10 was not able to move about in his hometown.

She testified they have no relatives in Croatia or close friends. She testified that if they had family back there, they would not have ended up in orphanages and being dispersed. She also testified that in 1995, her older sister was beaten to death in an unsolved murder in Croatia. She finally testified that after she kept the respondent in New York, the Government failed to pay his pension and when she went back to collect back-payments in the year 2001, government officials claimed they had no record of any payments due to someone named Vladimir Durkin.

Finally, the respondent's brother-in-law, Vesna's husband, testified about his experience in Croatia in the year 2003. His testimony was particularly probative because he has experience as a personal protective specialist and is a retired police officer in Honolulu Police Department. He was able to make observations about conditions in Croatia which also suggest that respondent would be targeted if he is returned there. For example, he was questioned by a chief of police and asked if his wife, Vesna, was a spy for the United Nations because she didn't speak slang Croatian, but rather spoke proper Croatian from the 1950's and 1960's.

He concluded his opinion that respondent's life or freedom would be threatened because they are still living in a quasi-Communist or a socialistic state

there and that young people want to get out badly but cannot. He opined that the respondent would be going back without having accomplished the American dream and that he would [be] ridiculed and taken down by people who want to drag others down with them. He also opined that respondent would be made an example of and that he would be worried everyday about the respondent's personal safety. The family would be unable to assist him with his physical safety if he is returned to Croatia. There is apparently no way that Vesna and her family would ever relocate to Croatia.

Respondent testified that he is so pro-American that he considers himself to be an American. He applied for naturalization in 1995 in New York but he had a juvenile record and was told by the Immigration and Naturalization Service in Honolulu that there [sic] were going to deny the application and that he needed to reply [sic] when his term of probation was over. He never reapplied.

Respondent testified that there was not much schooling in the orphanage and he cannot read or write Croatian or Serbian. He has almost no recollection of the city of Zagreb. He has a fear of returning to Croatia based on what his sister and other friends have told him and because it was bad when he was there as a child. He testified that his childhood was very traumatic and that he tries not to think about it or remember it. In conclusion, he stated that he was just abused from the time he got to the orphanage until the time he left for New York.

The Court has also considered the State Department reports. These seem to suggest that conditions are not as bad in Croatia as have been described the witnesses who have been there recently. On the other hand, at page three, there is a notation about widespread ethnic tension between ethnic Serb and Croat police officers and problems in the police force, including poor investigative techniques, insensitivity to ethnic issues, indecisive middle-management, and pressure from hardline local politicians.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The respondent has met his burden of proof to establish eligibility for withholding of removal. He has clearly suffered severe past persecution. He is not eligible for asylum because of the type of conviction that he has. If it were not for this conviction, the Court would've found that he was asylum eligible on the basis of severe past persecution similar to that found in *Matter of Chen*, Int. Dec. 3104 (BIA 1989). Having shown past persecution, the Court has balanced the information about recent visitations to Croatia by the respondent's sister, his brother-in-law, and by Mr. Tomic and finds that their evidence is also highly probative and must be considered even if the State Department reports don't specifically show that there is anti-Americanism.

The Court finds that because the respondent does not have a recollection of his traumatic childhood in

Croatia beyond what happened in the orphanage, because he does not speak for Croatian except for ~~simply~~ [simple /s/ DB] conversation with his sister, and because he has never been back to Croatia to assist Croats in their recent difficulties, that he would be singled out for severe harassment, threats, violence, and discrimination if returned to Croatia. This would be based upon his political opinion as very pro-American and also membership in a particular group, which would be ethnic Croatians who have returned to Croatia after being raised in the United States and who have not gone back to help the country defend against the Serbs, particularly when the individual is a man who, by his age and gender, would have been expected to return and help the countrymen.

Finding the respondent is eligible for withholding of removal, the Court will decline to make a finding that he is also eligible for withholding or deferral under the United Nations Convention Against Torture. This is because of the information in the State Department reports suggesting that perhaps there would not be any "acquiescence" from government officials. The term "torture" is defined within the regulations and is more specific and difficult to prove then the type of threat to life or freedom that is contemplated for withholding of removal. In other words, for withholding of removal, one need not establish that one would be "tortured" as defined in the regulations relating to the United Nations Convention Against Torture.

There does appear to be any other relief available and, accordingly, the following order shall be entered:

ORDER

IT IS HEREBY ORDERED that the respondent's application for withholding of removal to Section 241 is granted.

IT IS FURTHER ORDERED that he is removable to Croatia at time when withholding is no longer necessary.

IT IS FURTHER ORDERED that the respondent's application for withholding of removal under the United Nations Convention Against Torture is denied.

/s/ Dayna Beamer
DAYNA BEAMER
U.S. Immigration Judge

* [Reviewed without benefit of Record of Proceedings on Jan. 18, 2005.]

CERTIFICATE PAGE

I hereby certify that the attached proceeding before DAYNA BEAMER, in the matter of:

VLADIMIR DURKIN

A 90 240 441

Honolulu, Hawaii

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

/s/ Noreen D. Badua
Noreen D. Badua
(Transcriber)

Deposition Services, Inc.
6245 Executive Boulevard
Rockville, Maryland 20852
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December 27, 2004
(Completion Date)

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VLADIMIR DURKIN, Petitioner, v. MICHAEL B. MUKASEY, Attorney General, Respondent.	No. 05-76662 Agency No. A90-240-441 **ORDER** (Filed Feb. 27, 2008)

Before: O'SCANNLAIN, TASHIMA, and M. SMITH, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judges O'Scannlain and Smith vote to deny the petition for rehearing en banc and Judge Tashima so recommends. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. *See* Fed. R. App. P. 35(f).

The petition for panel rehearing and the petition for rehearing en banc are denied.